American Bar Association
www.supremecourtpreview.org

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,

Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF FORMER COMMISSIONERS AND SENIOR STAFF OF THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL S. FRIED
(Counsel of Record)
CHRISTIAN G. VERGONIS
ROBERT T. SMITH
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

April 7, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE USE OF DESCRIPTORS SUCH AS "LIGHT" AND "LOW TAR" AS SHORTHAND REFERENCES TO FTC METHOD TESTING RESULTS FURTHERS THE FTC'S SPECIFIC AND IMPORTANT POLICY OBJECTIVES 6

A. The FTC Employs a Broad Range of Regulatory Tools To Compel Compliance With Its Consumer-Protection Policies 7

B. The FTC Has a Long History of Regulating Claims About Tar and Nicotine Yields 10

C. The FTC Requires Uniform Testing of Tar and Nicotine Yields 13

D. The FTC Requires Disclosure of Tar and Nicotine Yields 17

E. The FTC Authorizes and Defines Descriptors Such As "Low Tar" and "Light" for Use As Shorthand References to Tar and Nicotine Yields 23

F. The FTC Maintains Its Policies Despite Awareness of Their Limitations 27

TABLE OF CONTENTS
(continued)

Page

G. The FTC Opposed Legislation That Would Have Permitted State-Law Claims Like Those Raised Here 31

H. Other Courts Have Recognized the Preemptive Force of the FTC's Regulatory Scheme 32

II. THE FTC PERMITS THE USE OF DESCRIPTORS ON CIGARETTE PACKAGES WITHOUT ACCOMPANYING DISCLOSURES OF FTC METHOD RESULTS 34

CONCLUSION 37

TABLE OF AUTHORITIES

Page

Cases

Airmark Corp. v. FAA,
758 F.2d 685 (D.C. Cir. 1985) 8

Aspinall v. Philip Morris, Inc.,
No SJC-09981 (Mass. Sup. Ct.)..... 2

Brown v. Brown & Williamson Tobacco Corp.,
479 F.3d 383 (5th Cir. 2007) 32, 33

FTC v. Brown & Williamson Tobacco Corp.,
580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and rev'd in part*, 778 F.2d 35 (D.C. Cir. 1985) 21, 22, 36

FTC v. Mandel Bros., Inc.,
359 U.S. 385 (1959) 8

Pearson v. Philip Morris, Inc.,
No. 0211-11819, 2006 WL 663004 (Or. Cir. Ct. Feb. 23, 2006) 15

Price v. Philip Morris, Inc., 848 N.E.2d 1 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006)..... 33

Watson v. Philip Morris Cos.,
127 S. Ct. 2301 (2007) 2

FTC Decisions

In re Am. Brands, Inc.,
79 F.T.C. 255 (1971) 26, 27, 35

In re Am. Tobacco Co.,
47 F.T.C. 1393 (1951) 11

In re Am. Tobacco Co.,
119 F.T.C. 3 (1995) 27

In re Benson & Hedges,
33 F.T.C. 1659 (1941) 10

TABLE OF AUTHORITIES
(Continued)

Page

In re P. Lorillard Co.,
46 F.T.C. 735, *aff'd*, 186 F.2d 52 (4th Cir. 1950) 11
In re R.J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950) 11

Statutes & Regulations

Federal Cigarette Labeling and Advertising Act
§ 2, 15 U.S.C. § 1331 7
§ 5(a), 15 U.S.C. § 1334(a) 34
Federal Trade Commission Act
§ 5(a)(1), 15 U.S.C. § 45(a)(1) 7
§ 5(m), 15 U.S.C.§ 45(m) 7
§ 6(g), 15 U.S.C.§ 46(g) 7
§ 13, 15 U.S.C. § 53 7
§ 18, 15 U.S.C.§ 57a 7
§ 19, 15 U.S.C. § 57b 7
16 C.F.R. § 1.1 (2008) 8
16 C.F.R. § 1.5 (2008) 8
16 C.F.R. § 2.34 (2008) 27
Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, § 207 ..... 3, 37

Legislative Materials

134 Cong. Rec. E1579-01 (May 17, 1988) 32
Accuracy of the FTC Tar and Nicotine Rating System: Hearing Before the Senate Comm. on Commerce, Science, and Transp., 110th Cong. (Nov. 13, 2007) 30

TABLE OF AUTHORITIES
(Continued)

Page

"Cigarette Testing and Liability Act of 1988," H.R. 4543, 100th Cong. (1988) 32
FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, & Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong. (May 7, 1987) 22, 23, 31, 32
False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. Of the Comm. on Gov't Operations H.R., 85th Cong. (1957) 11, 12
Nomination—1970: Hearing Before the S. Comm. on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, 91st Cong. (1970) 19
Strengthening the Cigarette Labeling Act, 112 Cong. Rev. 17,270 (July 27, 1966) 15

Federal Register Releases

Advertising of Cigarettes: Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule, 35 Fed. Reg. 12,671 (Aug. 8, 1970) 17, 18
The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment, 59 Fed. Reg. 51,980 (Oct. 13, 1994) 27

TABLE OF AUTHORITIES
(Continued)

Page

Cigarette Advertising and Other Promotional Practices; Announcement of Decision, 43 Fed. Reg. 11,856 (Mar. 22, 1978) 29
Cigarette and Related Matters: Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing, 31 Fed. Reg. 14,278 (Nov. 4, 1966) 14
Cigarettes: Testing for Tar and Nicotine Content, 32 Fed. Reg. 11,178 (Aug. 1, 1967) 14
Cigarette Testing; Request for Public Comment, 62 Fed. Reg. 48,158 (Sept. 12, 1997) 25
Cigarette Testing Results, Tar and Nicotine Content, 36 Fed. Reg. 15,074 (Aug. 12, 1971) 15
Cigarette Testing; Tar and Nicotine Content Results, 42 Fed. Reg. 21,155 (Apr. 25, 1977) 28
Commission Determination re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications, 48 Fed. Reg. 15,953 (Apr. 13, 1983) 28, 29
Report of the "Tar," Nicotine, and Carbon Monoxide Content of 370 Varieties of Domestic Cigarettes, 55 Fed. Reg. 42,768 (Oct. 23, 1990) 16

TABLE OF AUTHORITIES
(Continued)

Page

Report on the "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1249 Varieties of Domestic Cigarettes For the Year 1995, 63 Fed. Reg. 3576 (Jan. 23, 1998) 16

Other Authorities

1960 FTC Ann. Rep. 82 13
Br. for Federal Trade Commission as *Amicus Curiae*, *Gen. Motors Corp. v. Abrams*, No. 86 Civ. 9193 (CSH) (July 6, 1988) 9
C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Overview, in* National Cancer Institute, *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* (1996) 10, 13, 29
Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955) 12
Coalition on Smoking OR Health, Petition Before the Federal Trade Commission (1992) 30
Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Nov. 9, 1970) 19
Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Dec. 21, 1970) ... 19, 20

TABLE OF AUTHORITIES
(Continued)

Page

Correspondence from Cyril F. Hetsko, Senior Vice President and General Counsel, American Brands, Inc., to Thomas G. Egan, FTC Attorney (Oct. 21, 1971) 36
Correspondence from FTC to Hon. Thomas Luken (June 17, 1988) 32
Correspondence from FTC to Hon. Thomas Luken (July 1988) 32
Correspondence from FTC Chairman Janet D. Steiger to Samuel Broder, Director of National Cancer Institute (July 20, 1994) 25
Correspondence from FTC Chairman Miles W. Kirkpatrick to Commission (Nov. 24, 1970) 19
Correspondence from John D. Graubert, FTC's Deputy General Counsel, to Lucia M. Valente, Counsel to New York Attorney General (Sept. 10, 1998) 30
Correspondence from John P. Rupp, Attorney for cigarette manufacturers, to Judith P. Wilkenfeld, Program Director of Cigarette Advertising and Testing at FTC (June 30, 1987) 15
Correspondence from Joseph W. Shea, Secretary, to General Counsel, Director of Public Information, and Legal and Public Records (Dec. 22, 1970) 20
Correspondence from Paul Rand Dixon, FTC Chairman, to Warren G. Magnuson, Chairman of U.S. Senate Committee on Commerce (Apr. 11, 1966) 13, 14

TABLE OF AUTHORITIES
(Continued)

Page

Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky (Nov. 24, 1998) 31
Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to John Vance Hewitt (Dec. 17, 1959) 12, 13
Explanatory Memorandum Relating to Voluntary Program for "Tar" and Nicotine Disclosure (Dec. 17, 1970), *available at* http://tobaccodocuments.org/pm/2021574547-4551. html 36
FTC Consent Order Forbids Unlimited 'Low Tar' Claims by Cigarette Maker, FTC News (July 13, 1971) 27
FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content, Federal Trade Commission News (Oct. 1, 1970) 19
FTC News Release (Mar. 25, 1966) 14
FTC News Release (Oct. 26, 1967) 24
FTC News Release, *FTC to Begin Cigarette Testing* (Aug. 1, 1967) 14, 15, 16, 20, 28
FTC Operating Manual, *available at* http://www. ftc.gov/adminstaff-manuals.shtm 8, 27
FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan, Federal Trade Commission News (Dec. 23, 1970) 20

TABLE OF AUTHORITIES
(Continued)

Page

Federal Trade Commission 90th Anniversary Symposium—Program Brochure (Sept. 22-23, 2004), *available at* http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf 9
Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998) 31
Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* (June 30, 1968) 17, 24, 25
Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1979* 25, 34, 35
Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1980* 25
Federal Trade Commission, *Report to Congress Pursuant to the Public Health Smoking Act* (Dec. 31, 1970) 9, 10, 18, 20
Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* (1971) 35
Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Staff Report to the Federal Trade Commission* (June 1979) 25

TABLE OF AUTHORITIES
(Continued)

Page

Letter from Joseph W. Shea, Secretary to Howard H. Bell (Oct. 25, 1967) 24
Letter from Terrence J. Boyle, Attorney, Federal Trade Commission to Consumer, Caruthersville, Missouri (Mar. 27, 1975) 35, 36
Lynn T. Kozlowski *et al.*, *Cigarette Design*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* (2001), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/13/ 26
Matthew L. Myers *et al.*, *Staff Report on the Cigarette Advertising Investigation* (1981) 25, 35
Memorandum from Carol T. Crawford, Director, to Commission re "FTC Cigarette Testing Methodology" (Sept. 4, 1985) 30
Memorandum from Thomas G. Egan, FTC Attorney, to Secretary (May 15, 1973) 36
Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved, 92 F.T.C. 1035 (1978) 16, 20

TABLE OF AUTHORITIES
(Continued)

Page

Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, REGULATION (1997), *available at* http://www.cato.org/pubs/regulation/reg20n4d.html 23
Statement of Paul Rand Dixon, Federal Trade Commission Chairman, on Activation of Cigarette Testing Laboratory (May 15, 1967) 15
U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981), *available at* http://profiles.nlm.nih.gov/NN/B/B/S/N/ 26

INTEREST OF *AMICI CURIAE*

Amici curiae are former Commissioners and senior staff of the Federal Trade Commission (the "FTC" or the "Commission") who collectively reflect decades of FTC leadership:[1] George W. Douglas (Commissioner, 1982-1986), Margot Machol (Commissioner, 1988-1989), Roscoe Starek (Commissioner, 1990-1997), Thomas B. Leary (Commissioner, 1999-2005), Robert D. Tollison (Director, Bureau of Economics, 1981-1983), Wendy Gramm (Director, Bureau of Economics, 1983-1985, and Assistant Director, Division of Consumer Protection of Bureau of Economics, 1982-1983), John Peterman (Director, Bureau of Economics, 1988-1993, and various other senior positions beginning in 1976), Fred McChesney (Associate Director for Policy and Evaluation, 1981-1983), Joseph Mulholland (Economist, Division of Consumer Protection of Bureau of Economics, 1968-2007), John E. Calfee (Economist, Special Assistant to Director for Consumer Protection, Bureau of Economics, 1980-1986), and Jeffrey A. Eisenach (Special Advisor for Economic Policy and Operations,

---

[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. R.J. Reynolds Tobacco Company and Lorillard Tobacco Company have each made a monetary contribution to this brief's preparation and submission. Messrs. Peterman and Mulholland have in the past been retained as consultants or expert witnesses for Petitioners, but neither they nor any other *amici* joining this brief are being compensated for their role as *amici* in this case.

Office of the Chairman, 1984-1985, Economist, Bureau of Economics, 1983-1984).

Amici respectfully submit this brief to assist the Court in understanding the full context and nature of the FTC's comprehensive regulatory control over the conduct at issue in this case.[2] *Amici*'s experience at the FTC give them a unique perspective on the Commission's regulatory approach generally and on the specific role that the FTC has played, and continues to play, in the regulation of cigarette advertising. In particular, *amici* are intimately familiar with the FTC's decades-long efforts to ensure that consumers receive useful and accurate information about the tar and nicotine smoke content of competing brands of cigarettes. These efforts include employing a variety of formal and informal regulatory tools to foster a uniform standard for measuring tar and nicotine yields, to compel disclosures of those measurements in cigarette advertisements, and to define and authorize the use of various descriptors, such as "low-tar" and "light," as shorthand, consumer-friendly references to those measurements.

---

[2] This brief is substantially similar to briefs filed by undersigned counsel for similar groups of *amici* in *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007), and *Aspinall v. Philip Morris, Inc.*, No. SJC-09981 (Mass. Sup. Ct.), both cases in which the history of the Commission's regulatory control over the testing, disclosure and advertising of tar and nicotine yields in cigarettes was also relevant. The brief has been adapted to address the issues relevant to this case.

SUMMARY OF ARGUMENT

This case involves, *inter alia*, the scope and preemptive effect of the FTC's comprehensive and detailed regulation of the testing, disclosure and advertising of tar and nicotine yields in cigarettes. Respondents contend that the use by Petitioners Philip Morris USA Inc. and Altria Group, Inc. of the descriptors "lights" and "lowered tar and nicotine" on packages of Marlboro Lights was deceptive under Maine's Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, § 207, because, according to Respondents, those descriptors created the allegedly false impression that consumers would receive lower amounts of tar and nicotine from Marlboro Lights than from regular Marlboro cigarettes.[3] But the application of state law to the use of these descriptors may subject Petitioners to liability for engaging in conduct specifically permitted and authorized by the FTC, and would stand in direct conflict with the FTC's decades-long policy of providing a standardized baseline of information about tar and nicotine yields that permits smokers to choose cigarettes based on a specific FTC-defined metric.

The FTC has, for decades, exercised comprehensive and detailed oversight over cigarette companies'

---

[3] Marlboro Lights is just one of many brand varieties of "light cigarettes" advertised and sold using descriptors such as "low tar" or "light." As explained below, the FTC has authorized the use of these descriptors as shorthand references to specifically defined ranges of tar yield as measured by FTC-mandated testing.

claims about the tar and nicotine yields of their products. It has done so using the wide array of formal and informal regulatory tools at its disposal, including rulemaking, policy statements, case-by-case adjudication and consent decrees, advisory opinions, and nominally "voluntary" agreements among the major cigarette manufacturers. Through these measures, the FTC has compelled the cigarette companies to comply with the agency's policy determinations concerning the most effective and efficient way to ensure that consumers receive reliable information about the tar and nicotine levels in various cigarettes. Among other things, the FTC:

- developed and mandated the use of a uniform method for determining tar and nicotine yields (referred to as the modified Cambridge Filter Method or the FTC Method), with full awareness of the limitations of the standardized method;
- took the unique step of conducting the tests itself in its own testing laboratory for over twenty years, before eventually ceding testing responsibility to the tobacco industry under FTC specifications and supervision, and publishing those results;
- required cigarette companies to disclose tar and nicotine yields, based on the FTC Method, in all non-permanent cigarette advertisements; and
- defined and authorized the use of the descriptors challenged by Respondents in this case under conditions in which the Commission determined they function as shorthand,

consumer-friendly references to FTC Method results.

The FTC took these actions for two reasons: so that consumers would be able to consider tar and nicotine yields in making their brand choices, and so that cigarette manufacturers would be encouraged to compete on the basis of tar and nicotine yields.

The First Circuit's view that these regulations are not compulsory because they resulted from agency action short of rulemaking ignores the realities of the Commission's regulatory strategies. While the disclosure of tar and nicotine yields results from an agreement among industry participants, that agreement is "voluntary" in name only. The FTC chose to compel such disclosure, but decided—based on past experience and with the support of members of Congress—that securing an agreement with the major cigarette manufacturers would be more efficient and effective than promulgating a formal rule. The Commission therefore coerced industry participants to enter into an agreement in lieu of rulemaking, demanded that the agreement comply with the agency's exact requirements, and made clear that the FTC would monitor compliance and initiate rulemaking if the agreement turned out to be ineffective. The FTC has similarly demanded, without the need for a formal rule, that cigarette companies strictly limit their use of descriptors such as "light" and "low tar" to cigarettes falling within certain tar ranges as measured by the FTC Method.

Accordingly, when Petitioners undertook the conduct challenged in this lawsuit—*i.e.*, testing the tar and nicotine yields of their light cigarettes and

making representations about those yields—they did so pursuant to, and in full compliance with, the FTC's detailed and comprehensive regulatory directives. The imposition of state-law liability for such conduct would therefore interfere with and frustrate the accomplishment of the FTC's considered policy objectives in this area.

ARGUMENT

The First Circuit held that Respondents' state-law fraud claims challenging tar and nicotine descriptors are not preempted, even though such descriptors are concededly accurate under the FTC Method. This holding is incorrect. Petitioners were entitled to judgment as a matter of law because the application of Maine's Unfair Trade Practices Act to Petitioners' use of descriptors such as "light" and "low tar" conflicts with, and stands as a direct obstacle to the accomplishment and execution of, the FTC's policy goals and objectives concerning the testing, marketing, and selling of light cigarettes.

I. THE USE OF DESCRIPTORS SUCH AS "LIGHT" AND "LOW TAR" AS SHORTHAND REFERENCES TO FTC METHOD TESTING RESULTS FURTHERS THE FTC'S SPECIFIC AND IMPORTANT POLICY OBJECTIVES

Over the course of decades, the FTC has used a broad array of regulatory tools to impose detailed and specific requirements relating to the testing of, and advertising claims about, tar and nicotine yields in cigarettes. In doing so, the FTC adopted, announced and pursued specific policy objectives—namely, encouraging the development of progressively lower yield cigarettes as measured by the FTC Method, and

providing smokers with FTC Method tar and nicotine yield information so that they may use that information when making brand choices. Moreover, the FTC adopted and implemented these regulatory and policy directives in the context of the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"), a statute by which Congress sought to create a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." FCLAA § 2, 15 U.S.C. § 1331. When, in 1988, Congress considered legislation that would have repealed some or all of the Act's preemption provisions, so as to permit state consumer-fraud lawsuits like this one, the FTC opposed the legislation, informing Congress that permitting such suits would lead to "irreconcilable conflicts" with the FTC's policies.

A. The FTC Employs a Broad Range of Regulatory Tools To Compel Compliance With Its Consumer-Protection Policies

As an independent agency with far-reaching regulatory powers, the FTC employs a variety of tools to implement its broad mandate to protect consumers from "unfair or deceptive acts or practices." Federal Trade Commission Act ("FTC Act") § 5(a)(1), 15 U.S.C. § 45(a)(1). The FTC Act authorizes the Commission to promulgate rules, known as trade regulation rules, through notice-and-comment rulemaking. *See id.* §§ 6(g), 18, 15 U.S.C. §§ 46(g), 57a. The Act also empowers the Commission to initiate administrative adjudication, and to seek injunctive and monetary relief in federal court. *See id.* §§ 5(m), 13, 19, 15 U.S.C. §§ 45(m), 53, 57b.

The FTC also uses several less formal mechanisms to achieve regulatory compliance. For example, it frequently issues Industry Guides that serve as "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." 16 C.F.R. § 1.5 (2008). These Guides "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry," *id.*, and are especially useful in getting firms to abandon practices simultaneously where each firm may be reluctant to lose a competitive advantage by doing so unilaterally. *See FTC Operating Manual*, ch. 8, § 3.3, *available at* http://www.ftc.gov/foia/adminstaff-manuals.shtm (visited Apr. 1, 2008). The FTC also issues Advisory Opinions in response to requests by private parties. *See* 16 C.F.R. § 1.1 (2008). Such Opinions are "binding upon the Commission with respect to the person or group to whom such opinion is issued with regard to the acts, practices, or conduct described in the request." *FTC Operating Manual*, ch. 8, § 4.3.

Finally, the FTC uses the threat of formal agency action, such as rulemaking or litigation, to encourage industry participants to agree voluntarily to prevent unfair or deceptive practices. The FTC thus frequently enters into consent decrees to avoid or resolve litigation. *Id.*, ch. 6, § 3. While not formally binding on non-parties, a position taken by the FTC "in cases settled by consent" is "entitled to great weight." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959); *see also Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (holding that an administrative agency cannot "arbitrarily appl[y] different decisional

criteria to similarly situated [parties]"). The FTC intends that its enforcement actions resulting in consent orders will signal the FTC's policies to the industry, letting other participants know what practices result in an enforcement action by the Commission, and providing them with the opportunity to adjust their behavior accordingly. The FTC has thus expressed its understanding and intent that, where appropriate, "Commission rules, litigated cease and desist orders, and consents may preempt state law." Br. for Federal Trade Commission as *Amicus Curiae* at 1, *Gen. Motors Corp. v. Abrams*, No. 86 Civ. 9193 (CSH) (July 6, 1988); *see also id.* at 5-7 (arguing that FTC consent orders may preempt state law).

The FTC similarly encourages industry participants to adopt "voluntary" agreements as a substitute for trade regulation rules. Between 1919 and the 1960s, for instance, the FTC regularly held trade practice conferences to encourage industries to draft their own rules, subject to final approval by the Commission. *See Federal Trade Commission 90th Anniversary Symposium—Program Brochure* 6-7 (Sept. 22-23, 2004), *available at* http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf (visited Apr. 1, 2008). Because formal agency action typically entails the expenditure of significant resources by both the FTC and the industry, the solicitation of such "voluntary" agreements is often the most efficient way for the FTC to achieve its regulatory objectives; indeed, the FTC has characterized such agreements as "Regulatory[] Activity." *See* Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* 15 (Dec. 31,

1970) [hereinafter *1970 Report to Congress*] (J.A. 569a, 571a-72a).

As explained below, during the FTC's long history of regulating cigarette advertising, it has successfully employed all of these regulatory tools. It litigated against tobacco companies to challenge misleading tar and nicotine claims; it provided Industry Guides governing cigarette advertising; it issued Advisory Opinions regarding tar and nicotine claims; it used the threat of rulemaking to orchestrate a "voluntary" agreement among the major cigarette companies to provide tar and nicotine data in print advertisements; and it published policy statements concerning tar and nicotine advertising in the *Federal Register* and in its own FTC News Releases.

B. The FTC Has a Long History of Regulating Claims About Tar and Nicotine Yields

The FTC's history of regulating claims about the tar and nicotine yields of cigarettes dates back many decades. *See generally* C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Overview*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* 1, 2 (1996) (J.A. 649a-650a). The FTC took its first regulatory action involving tar and nicotine yields in 1941, compelling one tobacco company to stop asserting that the mouthpiece of its cigarettes appreciably removed nicotine from tobacco smoke. *See In re Benson & Hedges*, 33 F.T.C. 1659, 1659-60 (1941). A few years later, the FTC successfully enjoined three tobacco companies from making claims

about the nicotine yields of certain brands when medical experts and FDA testing indicated that the nicotine levels of these brands were not significantly lower than those of competing brands. *See In re R.J. Reynolds Tobacco Co.*, 46 F.T.C. 706, 729-31 (1950); *In re P. Lorillard Co.*, 46 F.T.C. 735, 748-51, *aff'd*, 186 F.2d 52 (4th Cir. 1950); *In re Am. Tobacco Co.*, 47 F.T.C. 1393 (1951).

By the 1950s, the cigarette industry had responded to the growing awareness of the health risks of cigarettes by creating and marketing filtered cigarettes as lower in tar and nicotine. Given uncertainties at the time about the health effects of tar and nicotine, the FTC initially sought to enjoin questionable advertising claims about filters and tar and nicotine yields. *See False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. of the Comm. on Gov't Operations H.R.*, 85th Cong. 274-75 (1957) (statement of FTC Acting Chairman Robert T. Secrest) [hereinafter Secrest Statement]. But because the FTC was not equipped to test cigarettes and there was no standardized test, it was difficult to prove that any particular claims were deceptive or unfair. *Id.* at 275-76.

As an alternative to litigation, therefore, the FTC elected to work with the industry to establish guidelines for cigarette advertising. In September 1955, following consultation with cigarette manufacturers, the agency formally adopted the Cigarette Advertising Guides for the use of its staff in evaluating cigarette advertisements. *Id.* at 276. Among other things, the Cigarette Advertising Guides permitted claims about tar, nicotine, and other ingredients of cigarette smoke, so long as such

claims had been "established by competent scientific proof." Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955). By 1957, working under the Guides, the FTC had obtained voluntary discontinuance of seventy-five advertising claims it found objectionable, without having to institute any formal proceedings; many other objectionable advertisements were abandoned before they ever reached the public. Secrest Statement, at 278-79. During his congressional testimony in 1957, FTC Chairman Secrest expressed satisfaction with the FTC's regulatory achievements:

> [The] adoption and administration of the guides did more to prevent deceptive advertising of cigarettes and to fulfill the Commission's responsibility to the public than it could possibly have accomplished by any other means.

Id. at 279-80.

Despite these efforts, during the second half of the decade, cigarette companies continued competing to produce and advertise cigarettes with lower tar and nicotine yields. During this "tar derby," as the period of competition became known, cigarette companies and others (*e.g.*, *Readers' Digest* and the Consumers' Union) employed different tar and nicotine testing methods to substantiate their claims about the lower yields of certain brands. Concerned that the lack of a uniform testing method was confusing to consumers, the FTC in December 1959 ended the "tar derby" by demanding that cigarette companies eliminate all references to low or reduced tar or nicotine in their advertisements. *See* Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to

John Vance Hewitt (Dec. 17, 1959) (J.A. 401a-02a). The FTC threatened to refer non-complying advertisements to the agency's enforcement bureaus. *Id.* The FTC subsequently sought and obtained signed undertakings from the seven major cigarette manufacturers to eliminate all references to tar and nicotine claims from cigarette advertising. *See* 1960 FTC Ann. Rep. 82.

FTC Chairman Paul Rand Dixon described these measures as notice to the industry that the FTC would deem any "reference to tar or nicotine content" sufficient to "support a complaint" for false and misleading advertising. *See* Correspondence from Paul Rand Dixon, FTC Chairman, to Warren G. Magnuson, Chairman of U.S. Senate Committee on Commerce 3 (Apr. 11, 1966) [hereinafter *Dixon-Magnuson Correspondence*] (J.A. 381a). Although the measures stopped short of formal regulatory action, C. Lee Peeler, then Deputy Director of the FTC's Bureau of Consumer Protection, described them as a "ban" on tar and nicotine advertising. Peeler, *supra*, at 2 (J.A. 651a).

C. The FTC Requires Uniform Testing of Tar and Nicotine Yields

During the 1960s, as mounting scientific evidence indicated that the health risks of smoking could be diminished through reductions in tar and nicotine yields, the public-health community questioned the FTC's total ban on tar and nicotine advertising. The American Cancer Society, for example, expressed its "conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of

the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes." *Dixon-Magnuson Correspondence*, at 8-9 (internal quotation marks omitted) (J.A. 387a).

In response to such demands, the FTC notified the nation's cigarette manufacturers that factual statements about tar and nicotine yields would no longer be deemed to violate the FTC Act or the 1955 Cigarette Advertising Guides, so long as no collateral health claims were made and claims about tar and nicotine content were supported by testing conducted in accordance with a uniform testing protocol approved by the FTC. *See* FTC News Release (Mar. 25, 1966) (J.A. 478a-479a). The FTC solicited comments and held public hearings on the proper testing protocol, *see Cigarette and Related Matters: Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing*, 31 Fed. Reg. 14,278 (Nov. 4, 1966), and, in reliance on comments and testimony, ultimately adopted as its testing protocol a modified version of the Cambridge Filter Method, which became known as the "FTC Method." *See Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (Aug. 1, 1967) (J.A. 294a-95a); FTC News Release, *FTC to Begin Cigarette Testing* (Aug. 1, 1967) [hereinafter *Testing Release*] (J.A. 485a-489a).[4]

---

[4] The FTC Method uses a machine to measure the tar and nicotine yielded when a cigarette is smoked according to specific parameters:

Responding to calls by members of Congress for the FTC itself to conduct cigarette testing, *see, e.g.*, *Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17,270, 17,274-75 (July 27, 1966) (Sens. Magnuson and Kennedy), the FTC took the very unusual step of opening its own testing laboratory in May 1967, and began testing cigarettes under the FTC Method on August 1, 1967. *See* Statement of Paul Rand Dixon, Federal Trade Commission Chairman, on Activation of Cigarette Testing Laboratory (May 15, 1967); *Testing Release*, at 1 (J.A. 485a). The FTC published the testing results approximately every year in the *Federal Register* and in its annual reports to Congress. *See, e.g.*, *Cigarette Testing Results, Tar and Nicotine Content*, 36 Fed. Reg. 15,074 (Aug. 12, 1971).

In 1987, the FTC ceded testing responsibility to the private Tobacco Industry Testing Lab (the "TITL"). *See* Correspondence from John P. Rupp, Attorney for cigarette manufacturers, to Judith P. Wilkenfeld, Program Director of Cigarette Advertising and Testing at FTC (June 30, 1987). Testing at the TITL is conducted under FTC monitoring and supervision,

---

> The FTC regulations involve the use of a cigarette smoking machine. The machine is set to specific parameters governing the depth to which the cigarette is inserted, the volume of air drawn through the burning cigarette with each "puff," the number of puffs drawn per minute and the amount of the cigarette consumed. The tar and nicotine captured by a filter in the machine are then measured.

Pearson v. Philip Morris, Inc., No. 0211-11819, 2006 WL 663004, at *1 (Or. Cir. Ct. Feb. 23, 2006).

Report of the "Tar," Nicotine, and Carbon Monoxide Content of 370 Varieties of Domestic Cigarettes, 55 Fed. Reg. 42,768, 42,768 (Oct. 23, 1990), including periodic unannounced inspections, and the FTC uses compulsory process to require the tobacco companies to submit the TITL's measurements to the FTC in sworn statements under penalty of perjury. *See, e.g.*, *Report on the "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1249 Varieties of Domestic Cigarettes For the Year 1995*, 63 Fed. Reg. 3576 (Jan. 23, 1998).

The FTC does not permit deviation from the FTC Method. To the contrary, the Commission adopted an official method precisely in order to provide a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." *Testing Release*, at 1 (J.A. 486a). The FTC thus made clear from the start that it would deem deceptive the use of measurements derived from any method other than the FTC Method, because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." *Id.* at 1-2 (J.A. 487a). Indeed, in 1978, the FTC issued an Advisory Opinion rejecting a request to use a measurement method other than the FTC Method, even if the method would produce *higher* tar and nicotine yields, because of the potential for consumer confusion. *See Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved*, 92 F.T.C. 1035, 1035 (1978).

In its 1968 Report to Congress, the FTC made clear its motivation for replacing its earlier ban on tar and nicotine advertising with its new testing regime:

> Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes.

Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 17 (June 30, 1968) [hereinafter *1968 Report to Congress*] (J.A. 527a).

D. The FTC Requires Disclosure of Tar and Nicotine Yields

The FTC's 1966 policy reversal was only the first step taken by the FTC to inform consumers about machine-measured tar and nicotine yields of cigarettes. Soon after, the FTC took steps to require manufacturers to include tar and nicotine yield disclosures in all cigarette advertising. Furthermore, the FTC determined that it would authorize and permit other representations of tar and nicotine—including the very sort of product descriptors challenged by Respondents in this action, such as "low tar" and "light"—so long as such representations and advertising claims were substantiated by FTC Method test results.

On August 8, 1970, the FTC formally proposed a trade regulation rule requiring cigarette manufacturers to "disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties [of cigarettes] . . . based on the most recently published Federal Trade Commission test results." *Advertising of Cigarettes:*

Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule, 35 Fed. Reg. 12,671, 12,671 (Aug. 8, 1970). The FTC explained that such disclosures were necessary to encourage "greater interest in obtaining a low tar and nicotine cigarette" and to facilitate "competition among the cigarette companies to meet that interest." *1970 Report to Congress*, at 15 (J.A. 566a).

Congress and the FTC recognized, however, that it would be preferable to avoid the attendant costs and delays of notice-and-comment rulemaking. During his confirmation hearings, FTC Chairman-designate Kirkpatrick was asked about the possibility of pursuing an industry-wide agreement as an alternative:

> The Chairman: I wanted to ask you if [the proposed Trade Regulation Rule on tar and nicotine listing in advertising] can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?
>
> Mr. Kirkpatrick: In my judgment; yes, sir.
>
> . . . .
>
> The Chairman: [I]t seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.
>
> Mr. Kirkpatrick: It would be a highly desirable arrangement, sir; indeed, yes.

Nomination—1970: Hearing Before the S. Comm. on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, 91st Cong. 172 (1970) (J.A. 637a-638a).

Accordingly—as it did a decade earlier in successfully ending the tar derby—the FTC took steps to prompt cigarette manufacturers to comply "voluntarily" with the FTC's desired requirements. With the proposed trade regulation rule looming, the Commission directed participants in the tobacco industry to submit a description of a proposed agreement to disclose tar and nicotine yields in cigarette advertising. *See FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content*, Federal Trade Commission News (Oct. 1, 1970) (J.A. 481a-482a). The Commission subjected the initial industry proposal to a round of public comment, and Commission staff ultimately recommended rejecting the industry proposal and threatened to continue the rulemaking process unless a number of changes were made. *See* Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Nov. 9, 1970) (J.A. 317a-328a); Correspondence from FTC Chairman Miles W. Kirkpatrick to Commission (Nov. 24, 1970) (J.A. 349a). On December 22, 1970, after the agreement had been revised to meet the FTC's requirements, the FTC voted to accept the agreement (the "1970 Agreement"), suspend the rulemaking proceeding indefinitely, and thereby "afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan." Correspondence from Allen F. Brauninger, Attorney, FTC Bureau of Consumer

Protection, to Commission (Dec. 21, 1970) [hereinafter Brauninger Dec. 21, 1970 Correspondence] (J.A. 330a-333a); Correspondence from Joseph W. Shea, Secretary, to General Counsel, Director of Bureau of Consumer Protection, Director of Public Information, and Legal and Public Records (Dec. 22, 1970) [hereinafter Shea Memorandum] (J.A. 377a-378a].

The 1970 Agreement requires that tar and nicotine yield measurements be disclosed in non-permanent cigarette advertising. Brauninger Dec. 21, 1970 Correspondence (J.A. 331a). The FTC characterized its exaction of the agreement as "Regulatory[] Activity" in its 1970 report to Congress, *see 1970 Report to Congress*, at 17-20 (J.A. 569a, 571a-572a), and warned the cigarette industry that it would reinstitute rulemaking proceedings if the agreement was not effective in compelling tar and nicotine yield disclosures. *See* Shea Memorandum (J.A. 378a); *FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan*, Federal Trade Commission News (Dec. 23, 1970).

In addition to using the 1970 Agreement to mandate testing and disclosure pursuant to the FTC Method, the Commission notified the cigarette industry that it intended to bring an enforcement action, for unfair and deceptive practices, against any cigarette company that used a measurement method other than the FTC Method, even if that method yielded higher tar and nicotine yields. *See supra* pp. 16-17 (describing *Testing Release* and 1978 FTC Advisory Opinion).

That the testing-and-disclosure regime established by the 1970 Agreement effectively binds the industry is exemplified by the 1983 enforcement action that the FTC brought against Brown & Williamson. In that case, Brown & Williamson had attempted to market a cigarette using tar and nicotine yields established by an independent testing method, rather than the FTC Method. *See FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and rev'd in part*, 778 F.2d 35 (D.C. Cir. 1985). Despite conceding the "literal truth" of the company's advertising claims, 580 F. Supp. at 984, the FTC sought and obtained an injunction barring use of that claim.

The D.C. Circuit upheld the district court's injunction without direct evidence of consumer confusion on the ground that deviation from the FTC Method was "inherently deceptive." 778 F.2d at 41-42. Noting that "tar milligram figures have significance only as comparative values," the court of appeals upheld the FTC's and district court's conclusions that no disclaimer disclosing use of a method other than the FTC Method could possibly eliminate the deception that would necessarily arise from the use of another testing method. *Id.* at 42-43. The court based this conclusion on the district court's findings that "after 12 years of exposure to FTC ratings, consumers have become 'habituated' to the tar and nicotine 'legends' in cigarette advertisements" and would likely not understand that any disclaimer "signified a departure from the long-utilized FTC Report numerical ratings." *Id.* at 43. The D.C. Circuit's holding thus endorsed the FTC's view that departure from the system of testing and disclosure

established by the 1970 Agreement constitutes a violation of federal law.[5]

In 1987, then-chairman of the FTC, Daniel Oliver, recognized the value of setting FTC policy through lawsuits like the one against Brown & Williamson. Chairman Oliver testified before Congress that "it is more efficient," and therefore "serves the consumers' interest better," for the FTC "to bring a single case against the first offender in order to stop the practice" without the need for rulemaking. *FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, & Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong. 17-18 (May 7, 1987) [hereinafter *Nicotine Program Hearing*] (testimony of FTC Chairman Daniel Oliver). Chairman Oliver explained further that, in the case of the cigarette industry:

---

[5] The D.C. Circuit narrowed the scope of the district court's injunction, which had permanently enjoined any and all such future departures, but only after envisioning a theoretical scenario in which one cigarette company conducted independent testing of all competing brands and prominently displayed the comparative results in its advertisements. 778 F.2d at 45. Because such a hypothetical advertisement might not be inherently deceptive, the D.C. Circuit reasoned, the FTC would, in the absence of a specific trade regulation rule, retain the burden of proving deceptiveness under the FTC Act. *Id.* The court's refusal to enjoin this highly unrealistic theoretical deviation from the FTC's testing-and-disclosure regime was based on First Amendment concerns about an "impermissibly broad prior restraint," *id.* at 43, and is fully consistent with the court's broader endorsement of the FTC's position.

> [I]t is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Id. at 19; *see also, e.g.*, Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, REGULATION, at 24, 25-26 (1997), *available at* http://www.cato.org/pubs/regulation/reg20n4d.html (visited Apr. 1, 2008) (FTC Commissioner explaining that the FTC "interprets and implements the FTC Act primarily through the prosecution and adjudication of individual cases").

E. The FTC Authorizes and Defines Descriptors Such As "Low Tar" and "Light" for Use As Shorthand References to Tar and Nicotine Yields

As the final prong of its regulatory program, the FTC approved the use of descriptors, such as "low tar" and "light," to refer to specified ranges of tar yields. The Commission recognized that, to the extent the descriptors function merely as shorthand, consumer-friendly references to FTC Method results, using them would support the FTC's dual goals of providing consumers with information about tar and nicotine yields and encouraging the manufacture of lower-yield cigarettes.

When the FTC reversed its policy in March 1966 and allowed the advertising of tar and nicotine yields, it was not initially clear to what extent the Commission would permit representations beyond the numerical test results, especially given the FTC's statement that it would permit no "collateral" representations *See supra* p. 14. Ultimately, the FTC adopted and publicized an "enforcement policy" providing that "representations relating to[] tar and nicotine content of cigarettes" are permissible "where they are shown to be accurate and fully substantiated by" FTC Method results. FTC News Release (Oct. 26, 1967) (J.A. 480a); Letter from Joseph W. Shea, Secretary to Howard H. Bell (Oct. 25, 1967) (J.A. 368a). That policy statement was specifically directed to "low tar" advertising claims, and the FTC emphasized that "[a]dvertisements which correctly report official FTC tar and nicotine yield data are within this category" of permitted and substantiated advertising claims. *Id.* (J.A. 369a)[6] The FTC repeated its position on this issue in its 1968 Report to Congress. *See 1968 Report to Congress*, at 18 (J.A. 527a-529a).

In its 1968 Report to Congress, the FTC also adopted the convention, since then continuously followed both inside and outside the industry, of

---

[6] As explained below, the FTC's required disclosure of FTC Method results related only to advertising, and not to labels on cigarette packages, because the Commission lacks the power to impose disclosure requirements relating to cigarette packages. *See infra* Part II.

using the descriptor "low tar" to refer to 15 milligrams or less of tar yield, measured by the FTC Method. *See id.* (J.A. 529a). The FTC has reiterated over the years that it "formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar.'" Matthew L. Myers *et al.*, *Staff Report on the Cigarette Advertising Investigation* 1-50 n.175 (1981) [hereinafter *Staff Report*]; *see also* Correspondence from FTC Chairman Janet D. Steiger to Samuel Broder, Director of National Cancer Institute 3 (July 20, 1994) (using the term "lower tar" to refer to cigarettes with less than 15 milligrams of tar).[7] Additionally, the FTC has generally treated the descriptor "light" as interchangeable with "low tar." *See, e.g.*, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997).

The FTC's definitions of these descriptors are well-understood in the public-health community. The 1981 Surgeon General Report, for example, stated that "[l]ower 'tar' cigarettes conventionally have been

---

[7] *See also* Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1979* 11 n.8 ("'The FTC defines ['low tar'] as 15.0 mg. or less tar") (J.A. 587a); Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1980* 18 n.11 (same) (J.A. 604a); Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Staff Report to the Federal Trade Commission* 35 (June 1979) (referring to the FTC's "official definition of low-tar cigarettes (15 or less milligrams of tar)").

defined as yielding 15 mg of 'tar' or less per cigarette." U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* 23 (1981), *available at* http://profiles.nlm.nih.gov/NN/B/B/S/N/ (visited Apr. 1, 2008). Similarly, the National Cancer Institute has explained:

> In the United States, cigarette brands yielding approximately 1-5 or 6 mg tar by [the FTC] method are generally called "Ultra-Light"; brands yielding between approximately 6 or 7-15 mg tar are called "Light"; and brands yielding more than 15 mg tar are called "Regular" or "Full Flavor." By convention, cigarettes yielding 15 mg tar by the FTC method are called "low tar."

Lynn T. Kozlowski *et al.*, *Cigarette Design*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 13 (2001), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/13/ (visited Apr. 1, 2008).

Consistent with its policy of allowing descriptors as short-hand references to FTC Method results—and as a signal to the industry—the FTC in 1969 launched a proceeding against a cigarette manufacturer for stating that certain brands were "lower" in tar in the absence of substantiation by the FTC Method. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971). In a 1971 decree resolving the case, the FTC reaffirmed that it would permit the use of descriptive terms such as "low," "lower," "reduced," and "like qualifying terms" only if their use was substantiated by the FTC Method and was accompanied in advertising by a

disclosure of the underlying tar and nicotine numbers under the FTC Method (as is required for all cigarette advertising by the 1970 Agreement discussed above). *Id.* at 258-59. Years later, in another consent decree, the FTC again reaffirmed that "express or implied representation[s] . . . that [a] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine" are not misleading or deceptive only if those representations are substantiated by FTC Method results. *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995). Before entry of this order, the FTC described this statement as providing "a limited 'safe harbor' for advertising that complies with certain specific requirements in its use of official tar and nicotine ratings." *The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment*, 59 Fed. Reg. 51,980, 51,982 (Oct. 13, 1994).[8]

F. The FTC Maintains Its Policies Despite Awareness of Their Limitations

From the beginning of its testing program, the FTC was aware that while the FTC Method accurately measures the comparative tar and nicotine yields among different brands of cigarettes when smoked

---

[8] Consistent with the FTC's policy for all consent decrees, 16 C.F.R. § 2.34, the *American Brands* and *American Tobacco* consent decrees were published for notice and comment. *See* 59 Fed. Reg. 51,980; *FTC Consent Order Forbids Unlimited 'Low Tar' Claims by Cigarette Maker*, FTC News (July 13, 1971). The FTC engages in notice and comment for consent decrees because it recognizes that consent decrees provide industry-wide guidance as to the FTC's regulatory policies. *See FTC Operating Manual* ch. 6, §§ 11-15.

under the identical circumstances simulated by the machines, it is of limited use in measuring or predicting actual tar and nicotine intake by individual smokers. The Commission explained to the public at the time it began testing that:

> [t]he [FTC] Method does not and cannot measure the[] many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by [a] machine in accordance with the prescribed method.

Testing Release, at 2 (J.A. 488a).

Nor did the adoption of the FTC Method end the Commission's investigation of its method's limitations. Since it began testing in 1967, the FTC has repeatedly considered whether it should abandon or modify its regulatory program in response to the very theories and allegations asserted by Respondents in this case. On each occasion, the FTC has declined to change its program, and use of the FTC Method is still required today. *See, e.g.*, *Cigarette Testing; Tar and Nicotine Content Results*, 42 Fed. Reg. 21,155, 21,155 (Apr. 25, 1977) (noting questions about method but declining to take further action); *Commission Determination re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine,*

and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications, 48 Fed. Reg. 15,953, 15,954-55 (Apr. 13, 1983) (seeking public comment on implications for testing of "compensatory smoking behavior"); *Cigarette Advertising and Other Promotional Practices; Announcement of Decision*, 43 Fed. Reg. 11,856, 11,856-57 (Mar. 22, 1978) (recognizing that smokers may "compensate" for low-tar cigarettes by covering ventilation holes and thereby increasing the amount of tar inhaled, but nonetheless deciding to retain FTC Method testing).

In declining to change its regulatory program notwithstanding evidence of smoker compensation, the FTC relied on epidemiological studies showing that persons who smoked cigarettes that measured lower in tar under the FTC Method were less likely to acquire smoking-related diseases than persons who smoked cigarettes that measured higher in tar under the FTC Method. *See* Peeler, *supra*, at 7 (J.A. 661a). As the FTC's Bureau of Consumer Protection subsequently explained:

> [A]bandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's.

Id. In fact, at the time, FTC staff specifically opposed abandoning the FTC's program because of fears that without the program, "cigarettes will gradually become higher in tar and nicotine," which "[e]vidence clearly

indicates . . . would be harmful." Memorandum from Carol T. Crawford, Director, to Commission re "FTC Cigarette Testing Methodology," at 42 n.41 (Spet. 4, 1985). More recently, in response to a question during Senate committee testimony whether the FTC would "object if Congress prohibited tobacco companies from continuing to make claims based on the FTC method," Commissioner Kovacic stated that he "would strongly prefer" that Congress first ask whether "there is an alternative measurement that would be an improvement." *Accuracy of the FTC Tar and Nicotine Rating System: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 110th Cong. (Nov. 13, 2007).

The FTC also investigated the use of descriptors in view of allegations similar to those made by Respondents here. For example, in 1992, at the behest of a consumer group, the FTC launched an investigation focused specifically on whether the terms "light" and "low tar" should be prohibited as deceptive. *See* Coalition on Smoking OR Health, Petition Before the Federal Trade Commission (1992) (J.A. 296a-308a). The FTC decided to continue to permit the use of these descriptors, as substantiated by FTC Method results. *See* Correspondence from John D. Graubert, FTC's Deputy General Counsel, to Lucia M. Valente, Counsel to New York Attorney General (Sept. 10, 1998) (J.A. 363a-365a). Similarly, in 1998, Senator Lautenberg requested that the FTC "begin a proceeding to suspend the right of tobacco companies to market any cigarettes as 'Light' or 'Ultra Light' or list supposed nicotine and 'tar' ratings on their products and advertisements until and unless an accurate system of measuring the health

implications of cigarettes is established." Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky (Nov. 24, 1998) (J.A. 398a-400a). The FTC again declined the request, explaining that the request "raise[d] issues currently under review at the Commission." Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998) (J.A. 483a-484a).

G. The FTC Opposed Legislation That Would Have Permitted State-Law Claims Like Those Raised Here

In 1987, Congress considered a proposal to repeal the preemption provisions of the FCLAA so as to permit state-law claims based on allegations about light cigarettes identical to those Respondents make here. *See, e.g.*, *Nicotine Program Hearing*. Subcommittee Chairman Thomas Luken opened that hearing by opining that "there are serious consequences regarding the public's understanding of the health consequences of smoking low tar and nicotine cigarettes." *Id.* at 2. The Subcommittee reviewed then-current cigarette advertisements, including ads for "light" cigarettes, *id.* at 28-42, and received testimony regarding low "tar" and nicotine cigarettes from Alfred Munzer, Chairman of the American Lung Association's Government Relations Committee, and Scott Ballin, Vice President and Legislative Counsel of the American Heart Association, *see id.* at 48-53. These officials from the public-health community opined that the FTC Test Method itself misleads consumers because smokers smoke differently than FTC Test Method parameters

(*e.g.*, by engaging in compensatory smoking behavior). *Id.*

Shortly thereafter, Representative Luken introduced the "Cigarette Testing and Liability Act of 1988," H.R. 4543, 100th Cong. (1988). The bill would have repealed the FCLAA's existing preemption of state-law deceptive advertising claims directed against low "tar" and nicotine cigarettes. *See* 134 Cong. Rec. E1579-01 (May 17, 1988). The FTC opposed that proposal, warning that the bill "would make it virtually impossible to advertise cigarettes on a national basis." *See* Correspondence from FTC to Hon. Thomas Luken 1, 6 (June 17, 1988). Responding to a follow-up request from Congress, the FTC further explained that the bill would permit a "single state" to "impose[] its decisions on citizens of other states or the entire country," and would increase the "potential for significantly inconsistent results" and an "irreconcilable conflict" with FTC policies regarding tar and nicotine disclosures, in that "one state [could] determine[] that tar, nicotine and carbon monoxide figures were per se deceptive, while another state [could] determine[] that disclosure of these data should be required in all cigarette advertising." Correspondence from FTC to Hon. Thomas Luken 8 (July 1988). Congress did not enact the bill.

H. Other Courts Have Recognized the Preemptive Force of the FTC's Regulatory Scheme

Numerous courts have held that the FTC's detailed regulatory oversight in this area precludes efforts to attack, under state law, the cigarette companies' use of descriptors. For example, in *Brown v. Brown &*

Williamson Tobacco Corp., 479 F.3d 383 (5th Cir. 2007), the Fifth Circuit held that "the use of FTC-approved descriptors [such as 'lights' and 'lowered tar and nicotine'] cannot constitute fraud." *Id.* at 392. The Court explained that "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement. In fact, [cigarette m]anufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method." *Id.* The panel thus concluded that "[t]he terms 'light' and 'lowered tar and nicotine' cannot, therefore, be inherently deceptive or untrue." *Id.* Moreover, it concluded, "[t]o hold that the [m]anufacturers' use of the FTC-approved terms relating the FTC-approved measurement system constitutes affirmative misstatement under State law would directly undermine the entire purpose of the standardized federal labeling system and most courts have been reluctant to find liability on this basis." *Id.*

Another court has recently observed that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams of the smoke produced by the advertised cigarette," and held that this precluded the imposition of liability for such conduct under a state consumer-protection statute. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 50 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006).

II. THE FTC PERMITS THE USE OF DESCRIPTORS ON CIGARETTE PACKAGES WITHOUT ACCOMPANYING DISCLOSURES OF FTC METHOD RESULTS

The First Circuit held that the Respondents' claims do not conflict with the FTC's long-standing regulation of tar and nicotine descriptors because, in the court's view, while the Commission permits cigarette companies to use descriptors such as "lights" and "low tar" on cigarette packages, it does so only insofar as the packages also display actual FTC Method results. This holding is based on a misunderstanding of federal law and a misinterpretation of the FTC's 1971 Consent Order with American Brands.

As explained above, the FTC does require cigarette manufacturers to display FTC Method results in cigarette advertising. *See supra* Part I.D. But the Federal Cigarette Labeling and Advertising Act prohibits the FTC or anyone else (other than Congress itself) from imposing any corresponding disclosure requirement on cigarette *packages*. That statute expressly provides that "[n]o statement relating to smoking and health, other than the [required Surgeon General's warning], shall be required on any cigarette package." FCLAA § 5(a), 15 U.S.C. § 1334(a).

In accordance with the express terms of the FCLAA, the FTC has long recognized that "[c]igarette manufacturers have *never* been required to disclose 'tar' and nicotine content on cigarette packages." Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and*

Advertising Act 3 (1979) (emphasis added) (J.A. 580a);[9] *see also Staff Report*, at 5-11 to 5-12 (noting that FTC had not sought to require disclosure of FTC Method results on packages "because Congress, in [the FCLAA], had retained jurisdiction over all health disclosures on cigarette packages"). Consistent with this understanding, the FTC has on several occasions requested that Congress impose such a requirement, *see, e.g.*, *id.* at 5-47 n.85, but Congress has not seen fit to do so.

Nor, contrary to the misapprehension of the court below, does the FTC's 1971 Consent Order with American Brands require such disclosures. Rather, in accord with the FCLAA, the 1971 Consent Order, by its express terms, restricts only claims made in "advertising," and does not extend to claims made on packages. *See In re Am. Brands*, 79 F.T.C. at 258-59. It is clear, moreover, that the FTC understood and intended the Consent Order to be so limited. For one thing, any other understanding would have, flatly contradicted the FTC's subsequent statements, quoted above, that manufacturers have "never" been required to disclose tar and nicotine yields on packages. *See supra* p. 34; *see also* Letter from Terrence J. Boyle, Attorney, Federal Trade

---

[9] The FTC was fully aware when it made this statement that Petitioners were marketing Marlboro Lights as a "light" cigarette with "lowered tar and nicotine," and that other cigarette manufacturers were marketing cigarettes with "lights" and "low tar" descriptors. *See, e.g.*, Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* 10, 12 (1971).

Commission to Consumer, Caruthersville, Missouri at 1 (Mar. 27, 1975) (citing the 1971 consent order but nonetheless explaining that "[t]here is no law or Government regulation requiring disclosure of 'tar' and nicotine contents on cigarette packages"). Moreover, American Brands submitted a compliance report under the consent order, representing that compliance with the 1970 Agreement—which all agree does not extend to cigarette packages, *see Explanatory Memorandum Relating to Voluntary Program for "Tar" and Nicotine Disclosure* (Dec. 17, 1970), *available at* http://tobaccodocuments.org/pm/2021574547-4551. html (visited Apr. 1, 2008) (specifying covered advertising)—constituted compliance with the Consent Order. *See* Correspondence from Cyril F. Hetsko, Senior Vice President and General Counsel, American Brands, Inc., to Thomas G. Egan, FTC Attorney 1 & Ex. 65 (Oct. 21, 1971). The FTC expressed no disagreement with this proposition and accepted the report. *See* Memorandum from Thomas G. Egan, FTC Attorney, to Secretary (May 15, 1973).

Finally, in the years following the 1971 Consent Order, the FTC closely monitored American Brands' compliance, as well as the other manufacturers' compliance with their disclosure obligations under the 1970 Agreement. The Commission was well aware, moreover, that these companies were using descriptors such as "lights" on their packages without also including numerical tar and nicotine yields. Yet the FTC never objected generally to this conduct, although it did take action where the descriptors were not substantiated by FTC Method results. *See, e.g.*, *Brown & Williamson*, 580 F. Supp. at 981.

Accordingly, the holding of the court below—that the use of descriptors on packages is impermissible without corresponding disclosure of FTC Method results—simply cannot be reconciled with the FTC's long-standing and consistent enforcement position of permitting the use of descriptors on packages without corresponding disclosures of FTC Method results.

CONCLUSION

For the reasons set forth above, in marketing and selling Marlboro Lights cigarettes, Petitioners have acted pursuant to a decades-long effort by the FTC to implement a national, uniform policy of informing the public about the health risks of smoking. In particular, to further its policies of encouraging the manufacture and use of lower tar cigarettes, the FTC authorized and permitted the use in advertising and on cigarette packages of short-hand, consumer-friendly references, such as "lights" and "low-tar," to refer to specific ranges of FTC Method results, without requiring any corresponding disclosure on packages of those actual results. Holding Petitioners liable under Maine's Unfair Trade Practices Act

would interfere with and frustrate the FTC's considered policy objectives in this area.

Respectfully submitted,

MICHAEL S. FRIED
Counsel of Record
CHRISTIAN G. VERGONIS
ROBERT T. SMITH
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

April 7, 2008